Supreme Court, U.S.
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No. 97-1234

In The

Supreme Court of the United States

October Term, 1997

GEORGE NEWMAN,

Petitioner,

vs.

CONSOLIDATION COAL COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Did the district court in an action for exoneration from or limitation of liability err in undertaking an independent review of the evidence on the issues of exoneration and limitation notwithstanding findings of liability of a state court jury, where Petitioner expressly and voluntarily stipulated that all such issues would be litigated in the subject proceeding and that no aspect of the state court judgment would be raised as *res judicata*?

RESPONDENT'S RULE 29.6 STATEMENT

There are no subsidiaries which are not wholly owned by Consolidation Coal Company. The following are parent companies of Consolidation Coal Company:

Rheinbraun US GmbH

Rheinbraun AG

RWE AG

DuPont Energy Company

E.I. du Pont de Nemours and Company

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Respondent's Rule 29.6 Statement	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	6
I. The Petition Should Be Denied Because It Merely Involves The Re-examination Of Specific Factual Matters As Determined By The District Court And Affirmed By The Third Circuit Court Of Appeals. Review Of The Petition Implicates None Of The Recognized Bases For This Court Granting Certiorari.	6
II. The District And Circuit Courts Correctly Held Newman To What He Agreed By Way Of His Own Voluntary Stipulation.	9
Conclusion	21

TABLE OF CITATIONS

Cases Cited:

Acacia Vera Navigation Company, Ltd. v. Kezia, Ltd., 78 F.3d 211 (5th Cir. 1996)	14

Contents

	Page
Alma Motor Company v. Timken-Detroit Axle Company, 329 U.S. 129 (1946)	8
Carter v. Sea Land Services, Inc., 816 F.2d 1018 (5th Cir. 1987)	16
Commodity Futures Trading Comm. v. Schor, 478 U.S. 833 (1986)	14, 15
Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961)	8
Complaint of Dammers & Vanderheide, 836 F.2d 750 (2d Cir. 1988)	10
Complaint of Port Arthur Towing M/V Miss Carolyn, 42 F.3d 312 (1995)	11
Cooper v. Loper, 923 F.2d 1045 (3d Cir. 1991)	15
Edwards v. Arizona, 451 U.S. 477 (1981)	14
Ergo Science, Inc. v. Martin, 73 F.3d 595 (5th Cir. 1996)	16
Ex Parte Green, 286 U.S. 437 (1932)	10
Faretta v. California, 422 U.S. 806 (1975)	14
Gorman v. Cerasia, 2 F.3d 519 (3d Cir. 1993)	10, 14, 19

Contents

	Page
Guidry v. Sheet Metal Workers Intern. Ass'n, Local No. 9, 10 F.3d 700 (10th Cir. 1993)	16
Langnes v. Green, 282 U.S. 531 (1931)	10
Odeco Oil & Gas Co. v. Bonnette, 4 F.3d 401 (5th Cir. 1993)	10
Port of Pasco v. Pacific Island Investigation Co., 324 F.2d 593 (9th Cir. 1963)	10
Preferred RX, Inc. v. American Prescription Plan, Inc., 46 F.3d 535 (6th Cir. 1995)	15
Province and New York Steamship Co. v. Hill Mfg. Co., 109 U.S. 578 (1883)	11
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955)	8
Risher v. United States, 465 F.2d 1 (5th Cir. 1972)	17
Robertson Oil Co. v. Phillips Petroleum Co., 14 F.3d 360 (8th Cir. 1992)	16
Texaco, Inc. v. Williams, 47 F.3d 765 (5th Cir. 1995)	10, 14, 19
Texas v. Mead, 465 U.S. 1041 (1984)	9
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	8

Contents

	Page
United States v. Ruiz, 73 F.3d 949 (9th Cir. 1996) ...	16
Waring v. Clarke, 46 U.S. (5 How.) 441 (1847)	11
Statutes Cited:	
28 U.S.C. § 1292(a)(1) 8, 14, 18, 19	
28 U.S.C. § 1292(a)(3)	19
46 U.S.C. § 181, *et seq.*	1
46 U.S.C. § 185	1, 10
46 U.S.C. § 688	1
United States Constitution Cited:	
Seventh Amendment	9, 13
Rules Cited:	
Fed. R. Civ. P. Supp. R. F.	1
Fed. R. Civ. P. Supp. R. F(3)	10
Supreme Court Rule 10	9
Other Authority Cited:	
Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty* 895 (2d ed. 1975)	11

Contents

Page

APPENDIX

Appendix A — Order Of Court In The United States District Court For The Western District Of Pennsylvania Dated July 20, 1990 ..... 1a

Appendix B — Claimant's Motion To Vacate Or Dissolve Injunction And To Stay 4a

Appendix C — Response To Claimants' Motion To Vacate Or To Dissolve Injunction And To Stay And Supporting Memorandum Of Law 8a

Appendix D — Stipulation Of Claimants And Their Counsel 25a

Appendix E — Claimant's Motion To Adopt The Findings Of The Jury As The Findings Of The Court 26a

Appendix F — Excerpted Brief For Appellant 31a

STATEMENT OF THE CASE

Petitioner, George Newman ("Newman"), the Claimant in the present action, and Suzanne Newman, his wife (also an original claimant, whose claim was later withdrawn), filed an action against Respondent, Consolidation Coal Company ("Consolidation") in the Court of Common Pleas of Allegheny County, Pennsylvania at No. G.D. 90-00980 ("state court action") in January 1990. In their Complaint, the Newmans sought recovery for personal injuries that Mr. Newman allegedly sustained on April 27, 1989 while in the employ of Consolidation pursuant to the Jones Act, 46 U.S.C. § 688, and the doctrine of unseaworthiness under the general maritime law. Mrs. Newman asserted a claim for loss of spousal consortium.

On July 20, 1990, Consolidation commenced the within action in the United States District Court for the Western District of Pennsylvania seeking exoneration from or limitation of its liability with respect to the Newmans' state court action under the provisions of the Limitation of Liability Act, 46 U.S.C. § 181, *et seq.* and Fed. R. Civ. P. Supp. R. F. At the time of filing its Complaint, Consolidation deposited with the district court a bond in the amount of $120,000, in accordance with 46 U.S.C. § 185, representing the value of Consolidation's interest in the M/V Elizabeth and Barge No. MC 1029, the vessels on which Newman claimed to have been working at the time of his accident.

Upon filing of Consolidation's Complaint in the district court, and in order to protect the court's admiralty jurisdiction over this matter, said court, through the Honorable Alan N. Bloch, entered an Order on July 20, 1990 which, among other things, ordered that the

> institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the

> M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability be and the same hereby are stayed and enjoined. [Appx. 1a, 3a.]

By its application, Judge Bloch's order specifically enjoined any further prosecution of the state court action which the Newmans had previously filed.

After the parties had proceeded with discovery in the present action for approximately six months, the Newmans, on January 18, 1991, filed with the district court a Motion to Vacate or Dissolve Injunction and Stay requesting that the district court lift the stay that it had ordered on July 20, 1990 so as to allow the Newmans to pursue their Jones Act, unseaworthiness, and consortium claims in the state court action. In so requesting, the Newmans volunteered to stipulate that: (1) the district court had sole and exclusive jurisdiction of all issues relating to Consolidation's attempt to limit its liability in the present action; (2) no state court judgment would be *res judicata* as to any limitation fact or issue in the present proceeding; and (3) the Newmans' action would be confined to the state court proceeding. Appx. 4a-7a.

Citing established admiralty practice, Consolidation opposed the lifting of the stay in the present action, contending that the stipulations offered by the Newmans were insufficient to protect Consolidation's interests. Appx. 8a-24a. After receiving no opposition to Consolidation's contentions, on January 28, 1991 Judge Bloch ordered that the requested lifting of the stay would only be granted if the Newmans agreed to enter into stipulations which the district court deemed would adequately protect Consolidation's interest in the present action. Pet. 45a. A mere two days later the Newmans agreed and stipulated, *inter alia*, as follows:

> 1. The Claimants waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding.
>
> 2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption. [Appx. 25a.]

On February 1, 1991, the district court lifted the stay that it had imposed on July 20 of the previous year, allowing the Newmans to pursue their Jones Act, unseaworthiness and loss of consortium claims in state court. Pet. 47a.

In November 1991, after Suzanne Newman had withdrawn her claim, the state court action proceeded to trial and resulted in a jury verdict in favor of Newman in the amount of $1,327,000. The jury found that Consolidation was negligent under the Jones Act and that the vessel in question was unseaworthy and that Newman was 11.83 percent contributorily negligent. Pet. 43a. After both parties' cross-motions for post-trial relief were denied, the trial court entered an order molding the jury verdict to a damage award in favor of Newman in the amount of $1,244,519.50.

Both parties took cross-appeals to the Pennsylvania Superior Court where that court affirmed all appealed issues except the trial court's award of prejudgment interest in favor of Newman. After the parties were denied cross-applications for reargument before the Superior Court, Cross-Petitions for allowance of appeal to the Pennsylvania Supreme Court were also denied. On August 9, 1995, Newman petitioned this Court for Writ of Certiorari at docket number 95-240 on the issues of prejudgment interest and contributory negligence, which Petition was denied on October 10, 1995.

On June 15, 1995 Newman moved to have the present action returned to active status in the district court so that Consolidation's claims for exoneration from or limitation of liability could be litigated. That motion was granted on July 5, 1995. He then filed a Motion to Adopt the Findings of the Jury as the Findings of the Court urging that the district court adopt what he perceived to be the findings of the jury from the state court action. Appx. 26a. On August 4, 1995, the district court issued an order denying the Motion, which Consolidation had opposed. Pet. 34a.

On or about September 2, 1995 Newman filed with the Third Circuit Court of Appeals a Petition for Writ of Mandamus, and what he claimed was a protective appeal on September 1, 1995, each challenging the district court's refusal to adopt the jury findings in the state court action as binding determinations in the limitation claim of this case. Said appeal and petition were dismissed and denied, respectively on November 29, 1995. Newman petitioned for rehearing, which was also denied. On January 29, 1996 Newman petitioned this Court for Writ of Certiorari at docket number 95-1219, which was likewise denied on April 1, 1996.

The limitation/exoneration case was then tried in a bench trial before Judge Bloch on July 8, 1996.

On July 17, 1996 the district court issued Findings of Facts and Conclusions of Law ultimately concluding that Consolidation was entitled to exoneration from liability. Pet. 25a-33a. More particularly, the court concluded that Newman slipped and fell into the hold of Barge 1029, that the leaving line being utilized by Newman at the time of his accident had been cut, that the cutting of the leaving line occurred after Newman's accident and that therefore the condition of the leaving line could not have caused Newman's accident. Pet.

28a. Based upon these factual findings, the court held that Newman failed to prove that Consolidation was liable for negligence or that the vessel was maintained in an unseaworthy condition and that therefore Newman failed to carry his initial burden of establishing liability on the part of Consolidation. Pet. 32a. Accordingly, the court concluded that Consolidation was entitled to exoneration. Pet. 33a.

On appeal to the Third Circuit of Appeals, the district court decision was affirmed on August 17, 1997. Said decision was reported at 123 F.3d 126 (3d Cir. 1997). Pet. 1a. In particular, the Third Circuit held that Newman should be bound to his stipulation to waive *res judicata*[1] with regard to all issues of exoneration and limitation in the present proceeding, that Newman was not entitled to a jury trial in the present action, and that the district court did not err in its findings of fact or conclusions of law nor in its evidentiary rulings. Newman's Petition to the Third Circuit for Rehearing was denied on October 30, 1997.

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1. In so doing, Newman waived both claim preclusion and issue preclusion. Pet. 12a n. 8.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE IT MERELY INVOLVES THE RE-EXAMINATION OF SPECIFIC FACTUAL MATTERS AS DETERMINED BY THE DISTRICT COURT AND AFFIRMED BY THE THIRD CIRCUIT COURT OF APPEALS. REVIEW OF THE PETITION IMPLICATES NONE OF THE RECOGNIZED BASES FOR THIS COURT GRANTING CERTIORARI.

With his Petition, Newman seeks to have this Court reverse the Third Circuit Court of Appeals' decision affirming the district court's ruling holding Newman to his stipulation to have *all issues* relating to Consolidation's Complaint for exoneration from or limitation of liability tried before the district court, and not to invoke *res judicata* with respect to any issue decided in the state court action.[2]

In support of the Petition, Newman invokes several of the traditional and recognized bases for this Court granting certiorari, including the decision of the Third Circuit purportedly conflicting with those of other circuits, Pet. 10, 13, 16-17 and with the United States Constitution, Pet. 16, federal statute, Pet. 16, and prior decisions of this Court. Pet. 14. If the Third Circuit decision was conflicting in *any one* of these areas there may be an appropriate basis for this Court to grant certiorari. However, the decision of the Third Circuit implicates none of the principles cited by Newman. Instead, the decision can be distilled to one fact — one that involves neither conflict of the

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2. While Newman raised several issues on appeal to the Third Circuit, it is only the effect of Newman's stipulation that is the subject of the Petition. *See* Pet. 7-8.

circuit courts nor the Constitution, federal statute nor prior decisions of this Court. That fact is Newman's stipulation. This case need not and should not be decided on any of these purported "conflicts." As correctly analyzed by the Third Circuit, this is a case for simply enforcing an agreement that Newman freely and without objection made, and on which the district court and Consolidation relied.

For purposes of the Petition, Newman's stipulation is the most important element of his claim, yet he devotes essentially no discussion to it, other than to say, effectively, that he entered into it yet it should be disregarded.

While Newman calls for resolution of an apparent conflict between the circuits on whether a claimant in a limitation action must stipulate to waive the *res judicata* effect of a state court decision on claims for exoneration as well as limitation, the Third Circuit, while noting an apparent conflict, Pet. 9a, expressly stated that its decision *would not and need not* involve it taking a side in the conflict:

> In this case it is not necessary for us to take a position on how far a claimant's stipulation must go. In other words, we need not decide whether a district court, as a condition of dissolving the injunction against the state court proceedings, may insist that the claimant waive the *res judicata* effect of the state court finding on the liability issue because Newman has not preserved his right to raise this issue.
>
> * * *
>
> We therefore need not decide whether a claimant in a limitation action must waive the *res judicata* effect of the state court proceedings as to both limitation

> and exoneration issues in order to proceed in state court under the saving to suitors clause.

Pet. 10a-11a.

The Third Circuit made *no* determination as to the propriety of the district court's January 28, 1991 Order conditioning the lifting of the stay on Newman entering into specified stipulations. The fact that Newman did not seek to take an appeal of this ruling under 28 U.S.C. § 1292(a)(1) and, more importantly, that Newman did not even oppose the form of these stipulations, but instead immediately agreed and entered into them, was the basis for the Third Circuit ruling that Newman should be held to them. It didn't need to decide questions of conflict among the circuits or with the Constitution, federal statute or prior decisions of this Court.

Where no true conflict exists, certiorari is not appropriate. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). The Third Circuit decision is patently consistent with the rule of judicial interpretation that wherever possible, a court should not pass on questions of constitutionality if an alternative ground for the decision exists. *Alma Motor Company v. Timken-Detroit Axle Company*, 329 U.S. 129, 136 (1946); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 71-72 (1961). The Third Circuit decided the relevant issues presented to it in just this way.

The Petition then leaves for this Court merely to determine the factual issues concerning the stipulation, such as its interpretation, whether Newman waived any rights that he may have had to have the determinations of the state court made binding in the exoneration/limitation action, and whether he is judicially estopped from reneging on his stipulation. However,

individual factual determinations are decidedly inappropriate for review on certiorari. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984); United States Supreme Court Rule 10 ("A petition for a writ certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

Therefore, the Petition should be denied.

II.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY HELD NEWMAN TO WHAT HE AGREED BY WAY OF HIS OWN VOLUNTARY STIPULATION.

With his appeal from the district court's denial of his Motion to Adopt the Findings of the Jury as the Findings of the Court ("Motion to Adopt the Findings of the Jury"), his appeal to the Third Circuit, and now, his Petition to this Court, Newman seeks to have the findings made by the jury in the state court action that Consolidation was negligent and that the leaving line in question or the vessel on which Newman worked was unseaworthy, made as binding determinations *of fact* in the present action in order to circumvent the stipulation into which he knowingly, willingly and voluntarily entered. Newman maintains that the district court's refusal to do so, and the Third Circuit's agreement with that refusal, resulted in a reexamination of the jury's findings in the state court action and a denial of a jury trial in this suit, both — purportedly — in violation of the Seventh Amendment to the United States Constitution. Pet. 15-16.

The practice used by the district court was correct and consistent with over 60 years of admiralty procedure established by this Court. First, the district court's issuance of an injunction

on July 20, 1990 against Newman pursuing claims outside of the present action was completely proper and consistent with admiralty practice with regard to limitation/exoneration proceedings. *See Gorman v. Cerasia*, 2 F.3d 519, 523 (3d Cir. 1993) ("If a ship owner facing potential liability for a maritime accident files a complaint seeking protection under the [limitation] Act, the district court is authorized to stay all proceedings against the owner."), *citing* 46 U.S.C. App. § 185; Fed. R. Civ. P. Supp. R. F(3). To the extent Newman wanted to pursue his state court action, he was required to enter into stipulations sufficient to protect Consolidation's interests as a vessel owner. *See, Ex Parte Green*, 286 U.S. 437, 438-40 (1932); *Langnes v. Green*, 282 U.S. 531, 540-44 (1931); *Complaint of Dammers & Vanderheide*, 836 F.2d 750, 755 (2d Cir. 1988). The district court conditioning the lifting of the stay it imposed on Newman entering into a stipulation to waive claims of *res judicata* as to limitation and exoneration issues was based on this established admiralty practice.[3]

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3. Due to its nature, this practice has been held in certain instances to involve inherently redundant proceedings and apparently inconsistent determinations. *See Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 405 (5th Cir. 1993) ("So where, as here, all of the claimants are so anxious to take advantage of the perceived magnaminity of South Texas [state court] juries that they are willing to stipulate essentially that they will submit to two trials — the state court trial followed by a substantially redundant federal limitation proceeding — this court is hard put to deny them. We must accede to this choice *if* it is accompanied by stipulations fully protecting [the vessel owner's] right to limit liability and agreeing to abide by an admiralty court determination of the right to limit."); *Texaco, Inc. v. Williams*, 47 F.3d 765, 769 (5th Cir. 1995) (stay ordered lifted where, *inter alia*, claimants "agreed to stipulate that the limitation court is not bound by any decisions by other courts on issues relating to limitation *and* exoneration."); *Port of Pasco v. Pacific Island Investigation Co.*, 324 F.2d 593, 598, 599 (9th Cir. 1963) ("[T]he district court was free to make findings and conclusions which might

(Cont'd)

Barring Newman's request to have the stay lifted and agreement to enter into a stipulation to protect the interest of the vessel owner, the limitation action, including, Consolidation's claim for exoneration would be litigated before the district court. In such case, the district court sitting in admiralty, without a jury, *Waring v. Clarke*, 46 U.S. (5 How.) 441, 458-60 (1847), would have decided whether Consolidation had any liability to Newman, and if so, whether that liability should be limited. *Province and New York Steamship Co. v. Hill Mfg. Co.*, 109 U.S. 578, 595 (1883)[4]. In fact, Newman *did* petition to have the stay lifted so that he could proceed with his claims in state court, and apparently recognizing his obligation to stipulate to protect the interests of the vessel owner, Newman offered to stipulate that: (1) the district court would have sole and exclusive jurisdiction as to all limitation issues; (2) that no state court judgment could serve as *res judicata* as to any limitation fact or issue; and (3) that Newman would continue his action to the state court proceeding. In response to

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be expressly or implicitly inconsistent with the state court as a basis for the latter's decision on liability . . . It is nevertheless a permissible result in view of the stipulation of the parties, and the order entered pursuant thereto, dividing the decisional function between the two trial courts, each being given a free reign in the field assigned to it.")

Whether these redundancies or apparent inconsistencies *should* exist or be tolerated is of no moment for purposes of the present action insofar as Newman stipulated to such a result without presenting any timely opposition or challenge.

4. This is a two step process where if there is no finding of liability in the first instance, *i.e.*, exoneration, "there is nothing to limit." *Complaint of Port Arthur Towing M/V Miss Carolyn*, 42 F.3d 312, 317 (1995), *quoting* Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty* 895 (2d ed. 1975).

Newman's request, Consolidation filed a response arguing that the stipulation of the Newmans was insufficient to so protect those interests. Appx. 8a.

After receiving *no opposition* from the Newmans, the district court conditioned its lifting of the stay on their stipulating to waive any claim of *res judicata* based upon a state court judgment, and that Consolidation would have the right to litigate all issues pertaining to its claims of limitation and exoneration before the district court. The Newmans dutifully and enthusiastically, filed such stipulation only three days later, again *without any reservation or objection*. Appx. 25a. In reliance on that stipulation, the district court lifted the stay that it had imposed. Newman subsequently pursued his state court claims and after exhaustion of all of his appeals (culminating with this Court's denial of Newman's Petition for Writ of Certiorari) moved to return to the district court on June 15, 1995. Upon the district court's grant of that motion, Newman — without missing a beat — sought from the district court a summary resolution of the case through an adoption by the district court of the jury's findings and a separate finding in favor of Newman in total. Appx. 26a.[5] Without so much as one word about the

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5. Apparently mindful of the stipulation that he entered into, Newman attempted to circumvent its conditions by denominating his Motion presented to the district court as to one to "Adopt the Findings of the Jury as the Findings of the Court." However, Newman's use of this specious terminology in order to assert *res judicata* was recognized by the district and circuit courts as being patently transparent and in complete contravention of the stipulation.

Moreover, in his Petition, Newman states that "the federal court is free to consider whether Consol had privity of knowledge of the conditions giving rise to the accident as a threshold matter to determining whether Consol may limit its liability." Pet. 19. This statement however, represents another inconsistent position taken

(Cont'd)

stipulation that he freely entered into and which enabled him to pursue claims in state court, Newman sought to completely ignore his obligations. The calculated manner in which Newman pursued resolution of the limitation action armed with what (for him) were favorable jury findings — all in disregard of his explicit stipulations — smacks of disingenuousness toward the district court, and of doubt whether Newman *ever* intended to be held to those obligations.[6] As noted above, when presented with constitutional questions, courts must endeavor to resolve the case in which they are presented on *non-constitutional* grounds where possible. Indeed, the present dispute does not involve decisions contradictory to the constitution or federal statute or prior decisions of this Court. It likewise does not involve conflicting decisions of circuit courts. Instead, as found by the Third Circuit, this case involves merely the factual determination of what Newman stipulated to and whether he should be bound to that stipulation. The Third Circuit correctly held that the district court did exactly what Newman agreed that it could and should do in the limitation/exoneration action.

Accordingly, while Newman argues that the district court erred in conditioning dissolution of the injunction on the various stipulations that Newman ultimately entered into, those

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by Newman and a retreat from the relief that he sought in his Motion to Adopt the Findings of the Jury, namely, a summary determination that Consolidation was *not* entitled to litigate even the issue of its "privity or knowledge," *i.e.*, limitation, based on the determinations made in the state court action. Appx. 28a.

6. Significantly, Newman's Motion to Adopt the Findings of the Jury was the *first* mention of his belief that the Seventh Amendment proscription on re-examination of jury findings may be implicated. He had never before raised this issue to the district court despite ample opportunity to do so.

stipulations, the requirement of which was based on established admiralty practice, were entered into voluntarily, without objection and at Newman's own request. Newman cannot be heard now to renege on those stipulations or complain that he was operating under some kind of duress or coercion. *See Acacia Vera Navigation Company, Ltd. v. Kezia, Ltd.*, 78 F.3d 211, 218-219 (5th Cir. 1996) (party cannot argue an issue on appeal in contravention of stipulation that it entered into where it has not presented objection or argument to be considered by district court.). Significantly, if Newman had an objection to the district court conditioning the lifting of the injunction that it had imposed, he could have immediately appealed that ruling. *See* 28 U.S.C. § 1292(a)(1); *see also Texaco, Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995); *Gorman*, 2 F.3d at 523.[7]

To the extent that constitutional issues are implicated, as Newman has protested *only* since moving to have the district court resume its jurisdiction of the instant matter on June 15, 1995, any such rights that Newman claims have blatantly been waived by his own stipulation.

It is well-established that even constitutional rights may be waived if the waiver is voluntary, knowing, and intelligent. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Edwards v. Arizona*, 451 U.S. 477, 482-85 (1981). Whether the waiver was voluntary, knowing, and intelligent is to be determined from the facts and circumstances of a particular case. *Edwards*, 451 U.S. at 482. Waiver of a party's right to a jury trial may be effected in a variety of ways. It may be done expressly or impliedly. *Commodity Futures Trading Comm. v. Schor*, 478

7. Newman undoubtedly recognized the ability to file appeals to the Third Circuit from interlocutory orders with regard to these matters. He did so on December 18, 1992, which appeal was docketed at No. 92-3734 and on September 1, 1995, which appeal was docketed at No. 95-3491.

U.S. 833, 848-849 (1986). It may be done by conduct of the party. *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 548 (6th Cir. 1995), *citing, inter alia, Cooper v. Loper*, 923 F.2d 1045, 1049 (3d Cir. 1991) (participation in a bench trial constitutes waiver). All of these methods are presented by Newman's stipulation of January 30, 1991. It cannot be doubted that Newman's stipulation constituted a sufficient and binding waiver of any right that he may have had to have determinations made in the state court action bind the district court in this case, or any supposed right to a jury trial in the limitation/exoneration action or against a court's purported reexamination of jury findings. Specifically, it was *Newman* who moved in the district court to have the stay of the state court proceeding lifted, and who stipulated that he would waive any claim of *res judicata* based on that proceeding. It was *Newman* who stipulated that Consolidation would have the right to litigate "*all issues*" *relating to the limitation and exoneration proceeding.*

The issue of the necessity for and content of stipulations required for the admiralty court to lift the stay on the state court action was specifically presented in detail before the district court, prior to Newman entering into the stipulation — at least by Consolidation. Appx. 8a. Significantly, Newman never raised any Seventh Amendment issue, did not challenge Consolidation's position or the stipulation that the district court deemed necessary to permit the state court action to proceed, and voluntarily entered into that stipulation. Had Newman felt the stipulation required by the court was objectionable, he certainly could and should have challenged it then. Significantly, however, Newman raised *no* objection at that time. Since he raised no objection, the district court and Consolidation relied on his stipulation, agreeing to hold in abeyance the limitation/exoneration action that had been progressing toward trial, and allowing Newman to litigate his state court action. That concession allowed Newman to litigate his state court claims

through trial and appeals all the way to this Court only to have Newman, after that four year process, seek to renege on his stipulation and ask the district court to direct what he expressly agreed he would not request. Newman's assertion of constitutional and statutory rights, after having previously waived them, cannot now be asserted simply because he feels that the ultimate result is unjust to him. *See Carter v. Sea Land Services, Inc.*, 816 F.2d 1018, 1021 (5th Cir. 1987) ("Once a right, even a fundamental right, is knowingly and voluntarily waived, a party has no constitutional right to recant at will.")

The Third Circuit also correctly considered Newman judicially estopped from claiming the stipulation he entered into was improperly required by the district court. Pet. 10a n. 6. Indeed, it is well-settled that judicial estoppel precludes a party from abusing the judicial process by taking inconsistent positions in the same litigation. *See United States v. Ruiz*, 73 F.3d 949 (9th Cir. 1996); *Ergo Science, Inc. v. Martin*, 73 F.3d 595 (5th Cir. 1996); *Guidry v. Sheet Metal Workers Intern. Ass'n, Local No. 9*, 10 F.3d 700 (10th Cir. 1993); *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 360 (8th Cir. 1992). Newman's disregard of his own stipulation is precisely such a situation.

Newman's stipulation could not be more clear. When Newman stated that he would "*waive* any claim of *res judicata* based upon any judgment obtained in the state court proceeding[,]" (emphasis added), what was Newman waiving other than the potential claim that certain facts which may be relevant in the exoneration or limitation proceeding had already been adjudicated in the state court action by a jury and were thus binding in the present action?

When Newman agreed in his stipulation that Consolidation would "have the right to *litigate all issues* relating to its claims of limitation or exoneration of liability" in the limitation/

exoneration proceeding (emphasis added), what else was he agreeing to but to be subject to a bench trial on the merits of Consolidation's exoneration and limitation claims? The district court, in permitting the state court action to proceed, and Consolidation, in not opposing that ruling, relied on Newman's stipulation in these regards. As stated by the district court in its August 4, 1995 order denying Newman's Motion to Adopt:

> Claimant's attempt to have this Court adopt the state court jury's findings for purposes of the limitation proceeding is directly contrary to his own stipulation. In addition, in light of the stipulation, the claimant cannot argue that the complainant waived its right to litigate the limitation issues by proceeding in state court; the complainant undoubtedly relied on the claimant's stipulation when it agreed to litigate in a different forum.

Pet. 37a.

It is significant that the district court — which recognized the need for the stipulation, presided over its wording, and which lifted the stay on the state court action — so interpreted the effect of the stipulation. An appellate court should be reluctant "to disturb the district court's interpretation of a stipulation agreed upon by the parties during pretrial proceedings and approved by the court." *Risher v. United States*, 465 F.2d 1, 5 (5th Cir. 1972).

While Newman impressively sets forth the development of admiralty jurisdiction with regard to the saving to suitors clause and the Limitation Act, he devotes not a single word in his Petition to why he voluntarily entered the stipulation that is central to his claim, or its intended meaning, if that meaning is somehow different than its plain language.[8] In proffering the stipulation, Newman

8. Newman states in his Petition, "The Third Circuit has (Cont'd)

claims that he "chose not to take a permissive interlocutory appeal from the district court's order lifting the stay on the proceedings." Pet. 5. Newman disputes the Third Circuit's determination that by not taking an interlocutory appeal from an order "refusing to dissolve or modify an injunction," 28 U.S.C. § 1292(a)(1), he "has not preserved his right to raise this issue. Pet. 9a.

The circuit court's statement in this regard stems from Newman's argument to that court that when faced with the district court's order conditioning the lifting of the stay on the stipulation, Newman was powerless not to accede to the condition, instead being "forc[ed]" to enter into the stipulation and having "no choice but to sign on the dotted line." Appx. 31a-33a. *See also* Pet. 10a n.5. The court did not consider his objection to the district court "forcing" him to enter into the stipulation because he could have sought immediate appellate review of the order *and* did not "even object to the form of the stipulations[.]" Pet. 10a.

While Newman apparently claims that dismissal of his interlocutory appeal of the district court's denial of his Motion to Adopt the Findings of the Jury is inconsistent with requiring him to challenge the district court's order conditioning the lifting of the stay on certain stipulations, the orders were very different for appeal purposes. While the latter order was decidedly

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(Cont'd)
situationally converted permissive review into a mandatory appeal, and so required Newman to have been clairvoyant in predicting the district court's later interpretation of the stipulation." Pet. 20. In so stating, Newman *suggests* that the district court's "interpretation of the stipulation" was different than what he intended or its plain language. Yet, glaringly, Newman offers no insight or explanation as to what he intended by the stipulation that he freely and without objection entered into.

appealable as an order refusing to dissolve or modify an injunction and therefore immediately appealable, *Gorman*, 2 F.3d at 523; *Texaco, Inc.*, 47 F.3d 765 (5th Cir. 1995), the former order did not deal with any injunction (other than rejecting Newman's argument that the district court should ignore his stipulation), and was dismissed as not even being interlocutorily appealable as an order in admiralty determining the substantive rights and liabilities of the parties pursuant to 28 U.S.C. § 1292(a)(3).

Newman offered no opposition to Consolidation's brief in opposition to his motion to vacate or dissolve injunction and to stay. Instead, upon the issuance of the district court's order, Newman willingly, voluntarily and completely complied. To the extent that Newman challenges the district and circuit court's decision holding him to his stipulation, in failing to raise it before this appeal and, raising it for the first time in front of the district court, on July 19, 1995, he has waived his opportunity to do so. Instead of being "force[d]" to stipulate as noted in the court's order and having "no choice but to sign on the dotted line[,]" Appx. 32a-33a. Newman had ample choice to oppose Consolidation's brief in opposition, and to object to the court's order *and* to take an interlocutory appeal (*see* 28 U.S.C. § 1292(a)(1)). He did none of these.

Newman expressly stipulated that the district court would have exclusive jurisdiction for determining all issues related to Consolidation's Complaint for Exoneration From or Limitation of Liability and that *no* fact found by a jury in the state court action would serve as *res judicata* in the present case — a stipulation on which the district court and Consolidation relied. No other meaning has been or can be ascribed to the stipulation. For purposes of Newman's Petition, this case involves nothing more than the application of Newman's stipulation. While Newman suggests that he was simply waiting until the

appropriate time to challenge the district court's January 28, 1991 order conditioning any lifting at the previously imposed stay on certain stipulations[9] he did not appeal the order at that time (although could have), did not dispute Consolidation's argument on which it was based (Appx. 8a) did not challenge that district court's acceptance of that argument or in any way suggest that he believed the order was incorrect or improper. Instead he wholly complied with the terms of the order and did not look back until he realized the district court was going to hold him to his stipulation with its denial of his Motion to Adopt the Findings of the Jury over four years later.

The Petition is not about conflicting circuit court decisions or an unjustified departure from rights supposedly provided by the constitution, federal statute or prior decisions of this Court. It involves straight-forward application of Newman's clear agreement to relinquish those rights, assuming *arguendo* that they even exist in this context.

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9. "Newman chose not to take a permissive appeal from the district court's order lifting the stay on the proceedings.

* * *

Having now a final judgment Newman appealed to the Third Circuit." Pet. 5, 7.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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